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SEP 29 1993

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

September 29, 1993

Mr. William F. Caton  
Secretary  
Federal Communications Commission  
1919 M Street, N.W., Room 222  
Washington, D.C. 20554

DOCKET FILE COPY ORIGINAL

RE: Ex Parte Presentation - MM Docket No. 92-265

Dear Mr. Caton:

On this date, Stanley S. Hubbard, Marvin Rosenberg, and Ward L. Quaal, on behalf of United States Satellite Broadcasting Company, Inc. ("USSB"), made an oral ex parte presentation to the following Commission personnel:

Commissioner Andrew C. Barrett  
Commissioner Ervin S. Duggan  
James R. Coltharp  
Lisa B. Smith  
Daniel Meyer  
John C. Hollar

The purpose of the presentation was to support USSB's "Opposition to Petition for Reconsideration of the National Rural Telecommunications Cooperative," submitted in MM Docket No. 92-265, filed on July 14, 1993. A written memorandum was also distributed during the presentations. A copy of that memorandum is submitted herewith.

USSB also has participated in MM Docket 92-265 by filing Comments and Reply Comments in this proceeding.

An original and one copy of this letter and of the attached memorandum are being filed. If additional copies of this filing are required, USSB will supply them immediately upon request.

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FLETCHER, HEALD & HILDRETH

Should any question arise concerning this matter, or should any additional information be necessary or desired, please communicate with this office.

Very truly yours,

FLETCHER, HEALD & HILDRETH

*Patricia A. Mahoney*  
Patricia A. Mahoney  
Counsel for United States  
Satellite Broadcasting  
Company, Inc.

PAM:dlr  
Enclosure

EX-PARTE PRESENTATION: MM DOCKET NO. 92-265

THE USSB VIEW OF PROGRAM EXCLUSIVITY  
IN THE DBS MARKETPLACE  
September 1993

Two copies of this document have been provided  
to the Secretary of the FCC on September 29, 1993

## **THE USSB VIEW OF PROGRAM EXCLUSIVITY IN THE DBS MARKETPLACE**

**SEPTEMBER 1993**

The launch of the first high-power Direct Broadcast Satellite is scheduled for mid-December this year. This first satellite will be jointly owned by Hughes DirecTv and USSB. USSB will own 5/16ths of the satellite, and Hughes will own 11/16ths. Beginning in April, DBS service from 101° W. L. will offer all consumers nationwide an opportunity to deal with an alternate source of multichannel program supply. Initially, Hughes DirecTv and USSB will make approximately 80 channels of programming available to consumers everywhere. During the summer of 1994 a second high-power DBS satellite, which will be solely owned by DirecTv, will be launched. This satellite will allow DirecTv to offer an additional 80 or so channels of program service. With the launch of the second satellite in the summer of 1994, USSB's percentage of total capacity will sink from 5/16ths to 5/32nds. While there is much talk today about the proposals for cable service to expand to 150 or more channels, the likelihood of that happening universally across the United States during the next few years is non-existent. DBS will, however, in less than a year, be offering more than 150 channels of service to all Americans everywhere.

In addition to those cable homes which will be taking service from USSB and DirecTV, there will be millions of homes which do not have access to cable which will also be taking these same services. As a result of the advent of high-power DBS and MMDS, competition for multichannel viewers, both in and outside of cabled areas, will be intense.

We believe it is imperative that there be competition within the framework of high-power DBS. In order for there to be a healthy DBS marketplace, there must be "competitive exclusivity." The law and FCC regulations allow a single entity to control all of the transponders at any one orbital location. In our opinion, it makes good sense for the law, as is now the case, to allow exclusivity within the framework of the DBS industry. This is true within the framework of the terrestrial broadcasting industry where exclusivity has helped create a competitive and diverse marketplace.

In negotiations with Viacom and HBO, USSB and DirecTv each bargained for exclusivity. The exclusive provisions in the HBO/USSB and Viacom/USSB contracts are the result of USSB's being able to convince HBO and Viacom that, among other things, due to USSB's limited channel capacity, we will concentrate our efforts on the sale of Viacom and HBO programs. We were also able to convince these programmers that we will give them more attention because they will be the "gems" of our program packaging. In addition, HBO and Viacom believe in our approach to the marketplace. We have not sought exclusive public outlets for our programming, nor will we. Unlike DirecTv, USSB's programming will be available to every DBS equipment retailer whether or not those retailers are offering DirecTv services.\*

Without the right to bargain for and obtain exclusive program rights for the most important program product, it would not be possible to maintain a healthy, competitive marketplace. Imagine what could happen if exclusivity were prohibited and General Motors/Hughes Aviation-DirecTv were allowed to duplicate the popular programming which has been contracted to USSB. Not only would there be a waste of valuable broadcast spectrum as a result of the repetition of identical programming, but there would also be the very strong possibility that through "packaging practices" or predatory pricing, the smaller 5/32nd entity, USSB, could suffer irreparable damage.

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\* DirecTv has required, as a condition of representation, that the five distributors of RCA home receive equipment can sell only Hughes programming and not any USSB programming.

Such irreparable damage would result in a DBS monopoly and resultant loss of competitive program choices and pricing for the viewing public.

This lack of competition, if it were to come to pass, could be especially damaging to those millions of homeowners who live in non-cabled areas.

General Motors/Hughes-DirecTv has created an issue about "the poor competitive position" in which they will find themselves if they are not allowed to have access to the programming from HBO and Viacom which USSB has bargained for and obtained in a free and open marketplace. Hughes DirecTv/NRTC allege that USSB has paid exorbitant prices to HBO and to Viacom and that, therefore, USSB will not be able to offer attractive pricing to consumers. Nothing could be further from the truth! If one considers the following facts, it becomes clear that such claims are self-serving and not in the public interest. Consider, for example, that DirecTv will have the Disney Channel, TNT, Turner Classic Movies and the USA Network—all of which provide a large variety of movies. In addition, they will have more than 60 channels of exclusive impulse pay-per-view movies from Columbia/Tri-Star, Paramount Pictures, Sony Pictures, Turner MGM and Universal Pictures.\* In addition, DirecTv, because of its large channel capacity, will be the only high-power DBS operator at 101° to be in a position to take the two new movie services which will be provided by Encore/TCI and Liberty. As reported by the *Wall Street Journal* on September 24, 1993, "Encore Media Corp., TCI and Liberty in January plan to launch a new service that competes directly with Viacom's Showtime movie channel and the Movie Channel...." DirecTv may choose to carry these new services, and at the start of its service, will be able to compete head to head with USSB's premium movie services, while USSB will not be in a position to compete for pay-per-view movie services because USSB does not have the channel capacity and DirecTv has exclusive contracts.

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\* Movies generally newer than the USSB offerings.

USSB is making every effort and is currently in negotiations with the NRTC to strike a bargain with NRTC whereby NRTC will be able to sell certain Viacom and HBO programs to the general public. In any event, it should be made clear that all Americans who will own a DBS receiver, both in and out of the NRTC territories, will have full access to the HBO and Viacom offerings from USSB. USSB has made it clear to all concerned that every DBS equipment dealer—including NRTC dealers—will be encouraged to sell USSB's HBO and Viacom program services. USSB is also in discussions with Hughes DirecTv in an effort to make it possible for each to sell some of the other's programming.

Unlike cable, which from the very first day was a monopoly, DBS will begin in a very competitive world. It is imperative that the American people be guaranteed competitive offerings from DBS. The only way this can happen is for the free and open marketplace to allow "competitive exclusivity" within the high-power DBS industry.

The Congress, in the passage of the Cable Act of 1992, was wise to provide a framework for DBS which allows for "competitive exclusivity." The language of the Act allowed Judge Sprizzo, during oral arguments in the Primestar Partners case, to say:

Page 18, Line 18 — "Exclusive contracts are not forbidden now under the law."

Page 21, Lines 2-6 — "Exclusive contracts are not forbidden now except in those situations where the Cable Act forbids them, and even then the FCC has the power to make a finding of public interest which makes them legal, as I understand the statutory scheme."

Page 22, Lines 7-11 — "You want a presumption of illegality to attach to the exclusive contract, which Congress has not done except with respect to certain types of vertically integrated contracts. You want me to, in effect, amend the Cable Act. I can't do that."

Page 22, Lines 14-17 — You want me to send the opposite signal out to the market: that exclusive contracts are bad unless the FCC says they are good, and that is not what the statute says."

Page 25, Lines 20-24 — "...If I were to find it not to be in the public interest, it would have to be on the theory that exclusive contracts with orbital providers are under all circumstances unlawful, and that is not what the statute says...."

Page 27, Lines 6-17 — Larry Sidman: "The public has the protection afforded by the Cable Act."

Judge Sprizzo: "Yes, but people have to implement that by bringing an appropriate lawsuit or bringing an appropriate FCC proceeding. Until they do that, as it stands right now, Primestar and anybody else is perfectly free to enter into any exclusive contract that does not specifically violate the terms of the Cable Act...."

Unlike cable, DBS will not be operating in a marketplace which is a de facto monopoly. In our opinion, the public interest and fairness require that the DBS marketplace be given every opportunity to begin competitively without exclusivity prohibitions. There will always be time at a later date, if circumstances dictate, for the Congress to become involved.

Respectfully,

Stanley S. Hubbard

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Attachment: Existing DirecTv and USSB Program Contracts



## **DSS™ PROGRAMMING**

**UNDER CONTRACT AS OF 8/93**

### **USSB**

Showtime E  
Showtime W  
Showtime 2  
The Movie Channel E  
The Movie Channel W  
Flix  
HBO E  
HBO W  
HBO 2 E  
HBO 2 W  
HBO 3  
Cinemax E  
Cinemax W  
Cinemax 2  
Nickelodeon  
VH-1  
MTV  
All News Channel  
Comedy Central

### **DirecTy**

The Cartoon Network  
CBC Newsworld (Canada)  
CNN  
CNN Headline News  
CNN International  
C-SPAN  
C-SPAN 2  
Country Music Television  
The Discovery Channel  
Disney Channel  
E! Entertainment Television  
Family Channel  
The Learning Channel  
The Nashville Network  
Northstar (Canada)  
Sci-Fi Channel  
Superstation TBS  
TNT  
Turner Classic Movies  
USA Network

### **Pay-per-view Agreements**

Columbia/Tri Star  
Paramount Pictures  
Sony Pictures  
Turner MGM  
Universal Pictures

**All of this programming will be available to every DBS homeowner.**